STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

SOUTHEAST ANESTHESIOLOGY CONSULTANTS, PLLC, AMERICAN ANESTHESIOLOGY OF THE SOUTHEAST, PLLC, MEDNAX SERVICES, INC., AND RUSSELL A. SAUDER, M.D., M.B.A.,

PLAINTIFFS,

V.

THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, d/b/a CAROLINAS HEALTHCARE SYSTEM AND d/b/a ATRIUM HEALTH, THOMAS M. WHERRY, M.D., TOTAL ANESTHESIA SOLUTIONS, LLC, AND SCOPE ANESTHESIA OF NORTH CAROLINA, PLLC,

DEFENDANTS.

FILED
2018 MAR 26 P 4:05
MECKLENBURG CO., C.S.C.
BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 18-CVS- 5899

COMPLAINT

NOW COME Plaintiffs Southeast Anesthesiology Consultants, PLLC ("SAC"), American Anesthesiology of the Southeast, PLLC ("AASE"), and MEDNAX Services, Inc. ("MEDNAX") (collectively, the "Provider and Manager Plaintiffs respectively") and Russell A. Sauder, M.D., M.B.A. ("Dr. Sauder") (collectively, "Plaintiffs"), through counsel, for their Complaint against Defendants, The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Healthcare System and d/b/a Atrium Health ("CHS" or "Atrium"), Thomas M. Wherry, M.D. ("Dr. Wherry"), Total Anesthesia Solutions, LLC ("Total Anesthesia"), and Scope Anesthesia of North Carolina, PLLC ("Scope Anesthesia") (collectively, "Defendants"), and allege and state the following:

INTRODUCTION

1. Plaintiffs bring this action to redress harm Defendants have inflicted through a scheme to restrain trade in the community and misappropriate Plaintiffs' trade secrets and

confidential and proprietary information. Defendants obtained this information under false pretenses and have used it to set up a competing medical services provider, which Defendants have contracted to replace Plaintiff SAC as Defendants' exclusive provider of anesthesiology services. Defendants carried out this scheme to enhance their domination of the western North Carolina counties where Atrium facilities are located and punish SAC, a highly regarded provider of anesthesiology services, for resisting Defendants' effort to impose cheaper, substandard care on their patients.

2. Plaintiff SAC and affiliate AASE are providers of anesthesiology services that have served the patients of North Carolina for over 37 years. AASE employs more than 90 physician anesthesiologists, and SAC contracts with AASE to provide the physicians' anesthesia services to hospitals and other medical facilities for which SAC holds a professional services agreement. For nearly four decades, SAC and its predecessor have provided the anesthesiologists to, and served the patients of, Defendant Atrium, the area's largest health care system, under certain exclusive professional services agreements as amended from time to time (collectively, the "Atrium Agreement"). Plaintiffs' unwavering commitment to high quality patient care has earned Plaintiffs the trust of North Carolina's medical community, and Plaintiffs have repaid that trust by continually seeking ways to improve patient care at Atrium and the other medical facilities that they serve in this State.

3. Unfortunately, Defendant Atrium does not share that same commitment. In recent years, Atrium's patients have taken a back seat to its highest priority, which is to become one of the most dominant health care entities in the nation. But rather than compete fairly in the marketplace to achieve this goal, Defendant Atrium has resorted to anti-competitive tactics that have reduced health care competition and reduced the quality of care, while increasing patient

costs. The United States Department of Justice is now suing Atrium for imposing improper demands on insurance companies that, according to the federal government, "reduce competition resulting in harm to Charlotte area consumers, employers, and insurers." Atrium also faces class action complaints in federal and state court brought by patients based on wrongful contracting practices. The North Carolina Business Court recently held that the state court filing states a claim for causing patients to "pay more for health insurance, incur higher out-of-pocket costs . . . and [be] denied access to truthful information that would enable Plaintiffs to comparison-shop based on cost and quality."

4. In addition, in recent weeks, CHS announced its trade name would change to "Atrium Health" in order to allow it to further expand its footprint with acquisitions stretching across additional state lines.

5. While the above-referenced lawsuits against one of North Carolina's largest health care institutions are highly troubling, the predatory tactics they reveal represent just the tip of the iceberg. In the second quarter of 2017, Defendants introduced Plaintiffs to Dr. Wherry and one of his companies, Total Anesthesia, as "consultants" whom Atrium represented were helping it evaluate the provision of anesthesiology care across all of its facilities. In reliance on this representation, as well as the confidentiality terms in the Atrium Agreement, the Provider and Manager Plaintiffs shared highly confidential and sensitive business information and trade secrets with Dr. Wherry and Total Anesthesia to assist them in their purported evaluation.

6. On or about August 1, 2017, Atrium, as a negotiating tactic for the renewal of the Atrium Agreement, gave notice that it would not renew or would terminate such Agreement on December 31, 2017.

7. Among other things, during presentations, Atrium and/or Dr. Wherry advocated a patient care model that would require SAC to "lease" physician anesthesiologists to Atrium at all facilities and to agree to substantial cuts in the number of physician anesthesiologists present to supervise services provided to patients. As they heard Atrium's and Dr. Wherry's proposals, the Provider and Manager Plaintiffs voiced their deep concerns over the risks of such an inadequate patient care model. Nevertheless, Atrium assured Plaintiffs that it was willing to negotiate in good faith for an extension of the term of the Atrium Agreement, for purposes of providing sufficient time to negotiate a new agreement. In November 2017, Atrium in fact proposed another extension through June 30, 2018, and specifically requested further meetings in January 2018 with the Provider and Manager Plaintiffs.

8. The truth behind Atrium's plans only came to light when the Provider and Manager Plaintiffs discovered that Atrium's promised 2018 negotiations were a ruse—that Atrium had by that time already secretly committed to help Dr. Wherry establish a competing practice, utilizing a reduced staffing model and a structure that would permit Atrium, rather than the anesthesiology practice, to bill payors and negotiate pricing. Atrium thus replaced Plaintiffs with Dr. Wherry and Scope Anesthesia, which now will enjoy a substantial head start as Defendants' anesthesiology provider as a result of their theft of the trade secrets of the Provider and Manager Plaintiffs.

9. When Plaintiffs learned that Dr. Wherry's newly formed company had been selected to replace SAC, they were shocked. Atrium never revealed that Dr. Wherry or Total Anesthesia were preparing to become Plaintiffs' competitors. In addition, as part of its assurance to Plaintiffs that it was willing to negotiate in good faith, Atrium had agreed to amend the Atrium Agreement to include a standstill provision forbidding Defendants from "shopping" the contract to competitors during the negotiations.

10. Plaintiffs—a local physician who stands to lose his livelihood, two anesthesiology groups, and a manager of professional anesthesiology services—have filed this action to remedy Atrium's wrongful conduct and to ensure ongoing cost competition and quality care for the hundreds of thousands of area patients who are the recipients of anesthesia services each year. If Defendants are permitted to pursue their corrupt scheme, they will dramatically lower the quality of anesthesiology services in the region and put patient care in jeopardy, all for the sake of profit.

PARTIES

11. Plaintiff SAC is a professional limited liability company organized and existing under the laws of the State of North Carolina with an office in Mecklenburg County, North Carolina. SAC is wholly owned by its sole member, Eric W. Mason, M.D. ("Dr. Mason"), an anesthesiologist who at all times relevant hereto was and is duly licensed in good standing in the State of North Carolina.

12. Plaintiff AASE is a professional limited liability company organized and existing under the laws of the State of North Carolina and doing business in several locations across North Carolina.

13. Plaintiff MEDNAX is a physician practice management company and is a corporation organized and existing under the laws of the state of Florida.

14. Plaintiff Dr. Sauder is a citizen and resident of Mecklenburg County, North Carolina. He is a practicing anesthesiologist who at all times relevant hereto was and is duly licensed in good standing in the State of North Carolina. At all relevant times, Dr. Sauder has provided his services in the relevant marketplace as an employee of AASE to Atrium through the above-referenced Atrium Agreement.

15. Defendant Atrium is a publicly established non-profit hospital authority organized and existing under a statutory enactment of North Carolina law with its principal place of business in Mecklenburg County, North Carolina. Atrium is the largest hospital system in North Carolina and has substantial power and control in the relevant market for medical services; in fact, Atrium was recently ranked as the fifteenth largest medical group entity in the United States. As noted herein, Atrium recently changed its trade name from "Carolinas Healthcare System" to "Atrium" as part of its plans to grow even larger and branch into other states. The hospital facilities that Atrium presently operates in the western North Carolina region include, without limitation, those known as CMC Main, CMC-Mercy, Levine Children's Hospital (all in Charlotte), CHS-Cleveland (in Shelby), CHS-Kings Mountain, CHS-Pineville, CHS-Lincoln (in Lincolnton), and CHS-Union (in Monroe). Atrium provides medical services through more than 12 million patient encounters every year.

16. Although organized as the Charlotte-Mecklenburg Hospital Authority, Atrium, upon information and belief, conducts its affairs in much the same manner as any other for-profit business organization. Upon information and belief, Atrium spends millions of dollars annually on marketing its services to consumers, including sums paid to be recognized as the "official healthcare sponsor" of the Carolina Panthers, Charlotte Hornets, and Lowe's Motor Speedway. Despite the commercial nature of its operations, upon information and belief, Atrium annually receives millions of dollars in taxpayer subsidies for the provision of services to individuals who cannot pay their full bill, and enjoys certain exemptions from state and local taxes. Upon information and belief, Atrium enjoyed almost $10 billion in net revenue in 2016.

17. Upon information and belief, Atrium's ten highest paid executives in 2017 each earned between $1,178,886.00 and $5,380,055.00 in annual compensation.

18. Defendant Dr. Wherry is, upon information and belief, a citizen and resident of a state other than North Carolina. Upon information and belief, Dr. Wherry has never been a resident of the State of North Carolina.

19. Defendant Total Anesthesia is a limited liability company organized and existing under the laws of the State of Maryland. According to its website, Defendant Dr. Wherry is a member and co-founder of Total Anesthesia.

20. Defendant Scope Anesthesia is a professional limited liability company organized and existing under the laws of the State of North Carolina. It was formed, according to its Articles of Organization, with a purpose to provide "anesthesiologists and related services" to healthcare systems and entities within this State. Dr. Wherry is a member and organizer of Scope Anesthesia. He executed the Articles of Organization of Scope Anesthesiology during calendar year 2018, specifically on or about January 5, 2018. The North Carolina Medical Board ("NCMB") issued Scope Anesthesia a Certification on January 16, 2018, which Certification was a condition precedent to its incorporation. Scope Anesthesia's Articles were not accepted as filed by the North Carolina Secretary of State until January 30, 2018, the date on which, under North Carolina law, Scope Anesthesia first came into existence.

FACTUAL BACKGROUND

A. Plaintiffs SAC, Along With Affiliates AASE and MEDNAX, Have Provided Critical Medical Care in North Carolina for Almost Four Decades.

21. SAC is a physician group medical practice that has provided professional anesthesiology services in North Carolina for over 37 years. SAC's physicians (the "SAC Physicians") are employees of AASE, which provides the services of such physicians to SAC, and SAC in turn contracts with medical centers like Atrium for the provision of professional anesthesiology services by the SAC Physicians. SAC has provided these services through the

Atrium Agreement under which more than 90 SAC Physicians are the exclusive and sole providers of professional anesthesiology services to the Atrium facilities in North Carolina identified in the Atrium Agreement (the "Atrium Facilities"). Such Atrium Facilities include CMC-Main in Charlotte, NC, the largest hospital in the region and the region's only Level 1 Trauma center, which serves as many as 50,000 patients annually and performs approximately 16,000 annual inpatient surgeries and 18,000 annual outpatient surgeries. Over the course of their long relationship, Plaintiffs and the SAC Physicians have formed a close professional relationship with Atrium's surgeons and other medical staff at the Atrium Facilities for the benefit of the public. Anesthesia services are essential to both emergency and scheduled surgical procedures at all such Atrium Facilities.

22. Since 2010, SAC has also contracted with MEDNAX (via a "Management Services Agreement"), which provides SAC with medical practice administrative and management services, including, but not limited to, billing and collecting services for those professional medical services provided by the SAC Physicians, human resources, financial services, recruiting and credentialing of SAC's providers. MEDNAX also assists with contract negotiations on behalf of SAC for the provision of professional medical services, including, as needed, with Atrium. Under the Management Services Agreement, MEDNAX is paid a fixed annual fee by SAC for its services to SAC. At all relevant times, Atrium has been aware of the existence of the Management Services Agreement.

B. <u>The Atrium Agreement Contains Confidentiality Clauses, and That Agreement, Along with AASE's Agreements with the SAC Physicians, Contain Restrictive Covenants</u>.

23. The Atrium Agreement (as to all facilities) contains confidentiality requirements (the "Confidentiality Requirements") that, among other things, prohibit the disclosure to third parties or use of the Provider and Manager Plaintiffs' confidential information "(i) to those of its

employees, agents, subcontractors, professional advisors and independent contractors who are required to know such information for purposes of enabling the disclosing party to perform its obligations to the other party or to pursue and evaluate the business relationship with the other party and only so long as each person to whom such disclosure is made will be informed of the disclosing party's obligations hereunder and agree to be bound by the confidentiality provisions hereof; and (ii) as required by court order or other lawful process. In all such cases, each party will disclose or use the Confidential Information only to the extent required to fulfill such purpose or legal requirement." (Emphasis added).

24. The Atrium Agreement, as to all facilities, contains a non-solicitation and a no-hire provision that prohibits Atrium during the term of the Agreement from soliciting or employing any person then employed by SAC. The Atrium Agreement (at five of the Atrium Facilities) also contains a non-solicitation and a no-hire provision that prohibits Atrium during the term of the Agreement and for a period of one (1) year following the termination of the Agreement from soliciting or employing any person then employed by SAC.

25. Each of the SAC Physicians, including Plaintiff Dr. Sauder, is party to a written employment agreement with AASE, of which SAC is an intended third-party beneficiary. These employment agreements, as amended from time to time (collectively, the "Physician Employment Agreements"), have been in full force and effect at all times relevant hereto.

26. The Physician Employment Agreements contain, among other things, a non-compete covenant (the "Restrictive Covenant") that prohibits an SAC Physician, for a period of two years following termination of his or her employment, from practicing medicine within the specialty of anesthesiology within, among other things, (A) Mecklenburg County, North Carolina, (B) a twenty mile radius of any health care facility at which such SAC Physician rendered

anesthesia services during the year prior to termination, (C) a twenty mile radius of any health care facility at which such SAC Physician rendered medical services during the year prior to the Physicians' termination, or (D) a twenty mile radius of any facility owned, operated or controlled by Atrium or its subsidiaries or affiliates. The Physician Employment Agreements and the Restrictive Covenants therein are binding and enforceable contracts.

27. Defendants, and each of them, have at all relevant times been aware of the existence of the Restrictive Covenants in the Physician Employment Agreements and have repeatedly recognized such Restrictive Covenants orally, as well as in writing.

C. Atrium Has Recognized as Binding and Enforceable the Restrictive Covenants in the Atrium Agreement and the Physician Employment Agreements, as Well as the Important Professional Anesthesia Services Rendered by SAC and AASE Physicians.

28. Defendant Atrium recently acknowledged the enforceability of the Restrictive Covenants in connection with its motion to intervene in a 2017 civil action between SAC and AASE, and certain of their physician employees (the "2017 Action"). *See American Anesthesiology of the Southeast, PLLC v. Bamert*, Mecklenburg County Superior Court Division Case No. 17-CVS-13100. Atrium filed a motion for intervention in support of SAC's and AASE's motion for a temporary restraining order and/or preliminary injunction to enjoin the defendant physicians from ceasing the provision of critical care at Atrium's facilities. In connection with the motion for intervention, Spencer Lilly, Atrium's then-Senior Vice-President and President of the Central Division, submitted a sworn affidavit on July 19, 2017 (the "Lilly Affidavit"), in which he expressly acknowledged that Atrium had agreed not to solicit former SAC Physicians to work for Atrium, stating "The Services Agreement provides that SAC is the exclusive provider of services to these facilities. Although CHS has a limited ability to 'cover' should SAC fail to provide physicians, the agreement bars CHS from soliciting former SAC physicians." Lilly Aff., pp. 4-6.

29. In the 2017 Action, Atrium also recognized the validity and propriety of the non-compete and other terms in the SAC Physician Employment Agreements. In fact, Atrium, through Lilly, stated in the 2017 Action that "[m]embers of the [SAC] Physician Group should be ordered to meet the requirements of their respective employment agreements for the remainder of those agreements' terms." Lilly Aff., ¶ 27.

30. In the Lilly Affidavit, Atrium also recognized the importance of the services that SAC offered to Atrium and the community, beyond merely providing physician staffing, and admitted the critical importance of SAC's physicians in providing medical care at Atrium Facilities. Lilly stated:

> 9. To meet anesthesiology needs, CHS contracts with private medical practices which employ highly skilled physicians licensed and board certified in anesthesiology. . . .
>
> 10. CHS and its affiliate, Mercy Hospital, Inc. ("Mercy"), entered Exclusive Professional Services Agreements (the "Services Agreement") with Southeastern Anesthesiology Consultants, PLLC ("SAC") for SAC to be the exclusive provider of anesthesiology services in several specific CHS facilities. Although CHS has entered agreements with other service providers for anesthesiology services for facilities not covered by the Services Agreement, SAC, by a wide margin, is the largest provider of anesthesiology services to CHS.
>
> 11. The Services Agreement [i.e., the Atrium Agreement] is comprehensive. It requires SAC to provide anesthesiology services with physicians with appropriate specializations and facility privileges for the facilities covered under the agreement. It provides that SAC will not only provide qualified professionals to participate in medical procedures in these facilities, but it will also provide administrative and management support to coordinate the delivery of services. In doing so, SAC works with CHS and other professionals in CHS facilities to identify what services are needed and schedule them accordingly. Thus, while CHS identifies the broad needs of its facilities, SAC is responsible to recruit and train personnel, to identify those with appropriate qualifications and credentials to serve in each facility, and to oversee the specifics of scheduling, including when physicians are in service or on call....
>
> 14. It is in the best interests of CHS to enter into exclusive agreements such as the Services Agreement with SAC because exclusive arrangements promote physician and support staff proficiency and standardization of procedures, enhance the quality and consistency of patient care at a reasonable cost, provide prompt availability of

> anesthesiology services, and simplify scheduling of patients and physician coverage, among other things. . . .
>
> 15. . . . These physicians are intimately embedded in the fabric of CHS' operations. Their daily work is in CHS facilities. Those with management and administrative responsibilities constantly coordinate with other medical specialties to deliver care throughout CHS facilities.

Lilly Aff., pp. 4-6 (Emphasis added).

31. The Provider and Manager Plaintiffs reasonably relied on Atrium's sworn representations in the 2017 Action, as described in part above, by forming and acting on the belief that Atrium recognized the value of the services of the SAC Physicians, as well as the value to Atrium and to the public of the additional services offered by SAC (through itself and through the management services provided by MEDNAX).

32. The 2017 Action was resolved in less than thirty (30) days when AASE and the physician parties reached agreement on new compensation terms for the Physician Employment Agreements. During this time, SAC's provision of professional anesthesiology services continued uninterrupted at the Atrium Facilities.

D. <u>Defendants Conspire to Steal Plaintiffs' Business</u>.

33. Despite acknowledging the importance and the quality of the professional anesthesia services rendered by SAC and AASE and supported by MEDNAX, to patients in North Carolina, Atrium in recent years has sought consistently to subvert the parties' contract to increase their revenues at Plaintiffs' expense. For example, it demanded that the parties enter into "leasing" arrangements for professional provider services whereby Atrium would pay a fixed fee to lease all anesthesiology providers from SAC while giving Atrium sufficient control to bill and collect from payors for the services provided by the physicians and physician extenders.

34. In the spirit of preserving their business relationship, Plaintiffs had acquiesced to some of Atrium's demands at a limited number of smaller area facilities, but, as noted in the Lilly

Affidavit, the structure and value of SAC remained in place for the vast majority of patients in the region. Nonetheless, Atrium's financial plans led it to orchestrate a scheme to impose such a leasing model for professional anesthesia services at the primary facilities serviced by SAC, which would have the effect of eliminating any reasonable amount of revenue for the value of SAC's services and in fact would turn SAC into a staffing company.

35. Unbeknownst to Plaintiffs, in the Spring of 2017, Atrium decided to take matters into its own hands and conspired with Dr. Wherry and his entities to oust Plaintiffs from the market and to use Dr. Wherry as their pawn to do indirectly what they were contractually prohibited from doing directly. Before doing so, however, Atrium and Dr. Wherry decided to first steal Provider and Manager Plaintiffs' trade secrets and confidential and proprietary information, and plotted to potentially steal their anesthesiologists to establish Dr. Wherry and his companies as SAC's replacement.

36. In connection with this scheme, Atrium informed the Provider and Manager Plaintiffs in the Spring of 2017 that it had engaged a consultant and his company to assist Atrium in "evaluating" how anesthesia care is delivered at the Atrium Facilities. That company was Total Anesthesia. As noted above, Total Anesthesia is owned and managed in whole or in part by Defendant Dr. Wherry, the purported consultant. Unbeknownst to the Provider and Manager Plaintiffs, Total Anesthesia was not at the time and is not now authorized by the North Carolina Secretary of State to conduct or transact business in the State of North Carolina. Atrium represented to the Provider and Manager Plaintiffs that the role of Dr. Wherry and Total Anesthesia in connection with professional anesthesia services in the region was merely to assist it in such evaluation.

37. Relying on Atrium's representation as to Dr. Wherry's role, as well as the Confidentiality Requirements, SAC, throughout the summer and fall of 2017, shared with Atrium, Total Anesthesia, and Dr. Wherry large amounts of confidential, proprietary, and trade secret information that SAC utilized in its planning, management and operations. The information (the "SAC Confidential Information") was not previously known to Atrium and/or not otherwise publicly available. It included, without limitation, the details of SAC's coverage and staffing model, scheduling templates, subspecialty scheduling planning data, SAC methods for implementation of Enhanced Recovery After Surgery ("ERAS") protocols, details of physician compensation and confidential terms of employment agreements and structures—in other words, the inner workings and methods by which SAC achieved efficient and effective scheduling, coverage, and patient care for the more than 30,000 patients that they serve annually in the region. SAC permitted Dr. Wherry—at his request—to personally interview at length several of its physicians, including Chief Anesthesiologists, as well as Certified Registered Nurse Anesthetists ("CRNAs"). Consequently, Dr. Wherry, for himself and the other Defendants, learned all of the key trade secret and confidential business planning, scheduling methodologies, and staffing modeling information of SAC, AASE and MEDNAX that are necessary to provide professional anesthesia services to the Atrium Facilities in the relevant marketplace. The sharing of such information with a competitor is unheard of, especially when a hospital system is entertaining alternative providers in good faith. Dr. Wherry of course never identified himself as a new competitor in the region.

38. SAC shared the information with Dr. Wherry on the reasonable assumption that Atrium (and its professional advisor and independent contractor, specifically, Dr. Wherry) had and

would continue to adhere to its obligations under the above Confidentiality Requirements and that Dr. Wherry was solely present as a consultant and not present as a competitor as was later revealed.

39. On August 22, 2017, Atrium caused Dr. Wherry to make a presentation to the Provider and Manager Plaintiffs' representatives and Atrium. In the presentation, Dr. Wherry recommended, as Atrium's purported consultant, substantial cuts to the number of anesthesiologists who should serve patients at Atrium Facilities, and Atrium officials adopted his thinking. In those and ensuing discussions, Atrium, Wherry, or one or both of them, proposed that SAC agree to lease 8.0 fewer full-time equivalent ("FTE") physician anesthesiologists from the level Atrium currently had contracted with SAC for at the above-referenced lease sites (a 31% reduction of the current physician anesthesiologist workforce at those locations). Atrium and Wherry were advocating a reduction of more than 20 anesthesiologist FTEs overall. Wherry proposed and recommended such cost cutting measures including, but not limited to:

a. Providing anesthesia services coverage using a CRNA-only care model at several of its Facilities such that physician anesthesiologists would be only in a supervisory role or not present at all, thereby exposing the physicians involved to potential significant liability;

b. Having CRNAs assume obstetrical ("OB") labor and epidural activity at multiple clinical locations, with potential expansion to additional or all other Atrium Facilities;

c. Eliminating in house physician anesthesiologist coverage 24/7 at several Atrium hospitals while CRNAs assume OB labor and epidural activity such that physician anesthesiologists would provide physician coverage from home, as needed;

d. Providing CRNA-only coverage at CHS-Kings Mountain or transferring surgical patients to nearby facilities rather than providing on-site surgical services;

e. Eliminating nearly three FTE physician anesthesiologists covering cardiac surgical services at CHS-Pineville;

f. Reducing the number of FTE physician anesthesiologists by more than 30% at CMC-Mercy by having CRNAs perform pre-operative evaluations and

other specialized procedures currently performed by physician anesthesiologists on a large population of orthopedic surgical patients;

g. Drastically reducing the number of FTE physicians anesthesiologists at CMC-Main by more than 40%; and

h. Cutting the number of physicians anesthesiologists providing nightly call coverage at CMC-Main at a level that would make it extraordinarily difficult, clinically disruptive and potentially dangerous to patients relying upon specialty call coverage for Pediatrics, Pediatric Cardiac, Cardiac and Organ Transplantation.

40. The Provider and Manager Plaintiffs attempted for months to try to accommodate the service cuts requested of Atrium via Dr. Wherry's recommendations to the extent this could be done without compromising patient care and safety. However, they repeatedly stressed to Atrium certain errors and dangers in Dr. Wherry's recommended structures. As but one example, the Provider and Manager Plaintiffs informed Atrium that despite the physician service cuts advocated by Dr. Wherry on behalf of Atrium, he failed to include for some facilities' epidural services for pregnant women who were progressing into the need for C-Section deliveries.

41. Atrium nevertheless continued to demand that Dr. Wherry's reduced service approach be adopted at its facilities.

E. To Buy Time for Dr. Wherry to Put Atrium's Scheme in Place, Atrium Pretended to Negotiate an Extension of the Atrium Agreement.

42. In the midst of Plaintiffs' efforts to resist Atrium's attempts to impose substandard patient care, the parties faced the expiration of the Atrium Agreement, which was set to expire at midnight on December 31, 2017. In the summer of 2017, however, Atrium expressed a willingness to begin negotiations for a renewal or extension of the Atrium Agreement beyond July 2018. Based on Atrium's cooperation with SAC in the 2017 Action to preserve the services of SAC Physicians in the community, and Atrium's express recognition of the management services provided by SAC and MEDNAX, the Provider and Manager Plaintiffs reasonably believed that

Atrium would negotiate in a truthful and good faith manner to continue the parties' long-standing and valued relationship. Throughout the fall of 2017, Atrium representatives continued to hold themselves out as negotiating in good faith with SAC for its continued services.

43. For example, starting in early November, 2017, Lilly initiated requests that the parties extend the present Atrium Agreement for several months, purportedly to give the parties additional time to finalize the terms of a new or extended Atrium Agreement. He proposed that during the first three months of the six-month extension, Atrium would agree to a "no shop" or "standstill" clause by which Atrium would not solicit the services of any potential replacement for SAC's services. In fact, in an email dated November 10, 2017, Lilly represented that "I believe our agreement to extend is wise so we can approach our partnership in a thoughtful manner, but also want to encourage us to continue to work diligently to reach final agreement."

44. In reliance on Lilly's representations on behalf of Atrium, SAC agreed to a six-month extension from January 1, 2018 until June 30, 2018, with the offered "no shop" provision during the first three months.

45. On November 30, 2017, Plaintiffs met with Lilly and offered, among other things, to lease CHS-employed CRNAs in lieu of leasing AASE's physicians to Atrium at the remaining sites. Even though Atrium continued to insist on leasing the physicians for the additional facilities, Lilly, later the same day, emailed the Provider and Manager Plaintiffs' representatives, noting that there had been a "good discussion" and that Atrium had given the situation a "critical and realistic look." In the email, Lilly stated that he would be forwarding the signed extension agreements. The financial savings and benefit to Atrium from the November 30, 2017 proposal from Plaintiffs was approximately $6.8 million annually. However, Atrium wanted more.

46. In an email dated December 13, 2017, Lilly informed Plaintiffs that "[we] [CHS] look forward to reviewing your proposal and any other outstanding issues to help advance our negotiations. I will look ahead for some dates in January that we can get back together and discuss."

47. On December 19, 2017, Lilly asked SAC, AASE and MEDNAX management for a meeting during the first two weeks of January in order to continue discussions. The Provider and Manager Plaintiffs agreed to the meeting, on the reasonable expectation that the parties would continue to move in good faith toward a new agreement.

48. On December 22, 2017, Lilly emailed the Provider and Manager Plaintiffs again, noting that the Provider and Manager Plaintiffs' most recent staffing proposal did not cut enough physicians from the sites with physician leasing (Atrium wished to eliminate 8 full time anesthesiologists). Lilly also made it clear that Atrium would require lower rates of payment to the Anesthesia Plaintiffs for all the physicians' services in the region. Nevertheless, consistent with Atrium's prior statements, Lilly stated, "We look forward to discussing [the proposal] in more detail on January 15."

49. The meeting requested by Atrium did in fact occur on January 15, 2018, but Atrium did not discuss any proposal in detail. As Plaintiffs later discovered, Atrium had at that time already committed to replacing SAC with Scope Anesthesia. Instead, Atrium officials stated that their "interests" and the interests of the Provider and Manager Plaintiffs were not aligned and that they were ending their relationship with SAC effective June 30, 2018. During this meeting, Atrium never once discussed the issue of patient care.

F. <u>Plaintiffs Discover Defendants' Scheme</u>.

50. Since January 15, 2018, the Provider and Manager Plaintiffs have discovered that Defendants lied. Their representations about the purpose of Dr. Wherry's involvement in

negotiations and his "evaluation" of the details of Provider and Manager Plaintiffs' business and patient service model, as well as Atrium's desire to negotiate in good faith for a new agreement with SAC, were false the moment they were made. In each of the communications set forth above, Atrium, through Lilly, Dr. Wherry, and otherwise, was intentionally misleading the Provider and Manager Plaintiffs to entice them to continue to share confidential information and to continue to rely on Atrium's representations of ongoing negotiations over the Provider and Manager Plaintiffs' proposals, as well as on the no-shop agreement, until such point as Dr. Wherry could execute the final steps in the scheme by the actual formation of Scope Anesthesia.

51. The Provider and Manager Plaintiffs have learned that Atrium had in fact previously created a scheme with Dr. Wherry to cut Plaintiffs out of the regional marketplace described hereinbelow; use the non-public confidential, proprietary and trade secret information of the Provider and Manager Plaintiffs in the formation of a new structure for the provision of professional anesthesia services; and remove from the community the management and other services that Plaintiffs provide and which Lilly and Atrium had represented to the Court in the *Bamert* matter were so important—thereby imposing a fraud upon the Court by using the Court to its own advantage at the time.

52. Atrium knew that to carry out the scheme, it needed to create the illusion that it was not violating its non-solicitation and "no-shop" obligations to the Provider and Manager Plaintiffs. It therefore worked secretly with Dr. Wherry to have him (by himself and through his later formed new entity) do the physician recruiting that Atrium could not itself openly and/or directly undertake. As early as June 2017, and continuing in September 2017 and thereafter, Dr. Wherry caused online advertising to be placed for anesthesiologists to work in Charlotte, including without

limitation with a placement agency known as "Elevate Healthcare Consultants" and its agent David Ciske, on sites such as gaswork.com.

53. Atrium has also tried to cover its tracks in other ways. For example, to mask Atrium's involvement in the scheme, Roger Ray and Ken Haynes, its Chief Physician Executive and Chief Operating Officer, respectively, issued a letter dated January 15, 2018, that they had already prepared before meeting on that day with the Provider and Manager Plaintiffs. In that letter, they purported to instruct Atrium medical staff members not to solicit any SAC providers. In the same paragraph, however, they expressly stated that "we strongly desire to retain the services of current SEA [SAC] physicians. . . ." They of course sought to do so by driving the Plaintiffs from the market, leaving the SAC Physicians with no other means of earning a living locally, all the while waiting for their accomplice, Dr. Wherry, to do the hiring for their benefit.

54. When the Provider and Manager Plaintiffs recently notified Atrium that they believed that Atrium had acted in violation of the "no shop" requirement, Lilly responded, via an email dated February 1, 2018, that "Atrium negotiated and entered into an agreement with a different anesthesia services provider on December 28, 2017, before the period during which negotiations were prohibited had commenced." (Emphasis added). He was referring to Dr. Wherry's new entity, Scope Anesthesia. In other words, while attempting in Fall 2017 to lull Plaintiffs with the assurance of a forthcoming no-shop provision, Defendants were secretly setting up a competing company, and only entered into the no-shop once the plan was complete.

55. Indeed, on December 22, 2017 (just days before contracting with Scope Anesthesia on December 28), Atrium was representing to the Provider and Manager Plaintiffs that "[w]e look forward to discussing [the proposal] in more detail *on January 15*." (Emphasis added). Further, as noted above, at the January 15, 2018 meeting, Atrium did not discuss the Provider and Manager

Plaintiffs' proposal "in more detail"; further discussion was simply rejected out of hand—and without Atrium informing the Provider and Manager Plaintiffs before the meeting that they had already made their secret commitment to Dr. Wherry, who was by then in the process of forming his new company.

56. Atrium, in asking for the Atrium Agreement extension through June 30, 2018 with its effectively worthless "no shop" provision, was simply buying time for Dr. Wherry's start-up operation to open its doors. But Scope Anesthesia was not a legal entity that *could* contract with anyone until its incorporation papers were accepted by the North Carolina Secretary of State on January 30, 2018.[1] Thus, no legally binding agreement could exist or be consummated between Atrium and the non-existent Scope Anesthesia before the beginning of the no-shop period.

G. <u>Defendants' Scheme Will Hurt North Carolina Patients and Local Physicians</u>.

57. The Provider and Manager Plaintiffs shared their non-public confidential information with Dr. Wherry on the assumption that Atrium had and would adhere to its obligations under the Confidentiality Requirements of the Atrium Agreement. Upon information and belief, Defendants are now beginning to operate under the Scope Anesthesia structure and scheme. They have based the planning, contracting, scheduling and operations of Scope Anesthesia on the confidential, proprietary and trade secret information of the Provider and Manager Plaintiffs. This information was obtained by Dr. Wherry, with the consent and knowledge of Atrium, for secret, improper, and unfairly competitive purposes.

[1] This is not to say that Defendants were reluctant to hold the non-existent entity out to prospective hires prior to its formation; to the contrary, by January 17, 2018, nearly two weeks before becoming a recognized entity in North Carolina, "Scope Anesthesia Services, PLLC" was advertising nationally online for full-time anesthesiologists in Charlotte.

58. Although Scope Anesthesia has copied Plaintiffs' business models, practices and salary structure, the standard of care they intend to deploy represents a sharp negative departure from Plaintiffs' high-quality care. The service model developed at Atrium Facilities by SAC (and SAC's predecessor entity, Southeast Anesthesiology Consultants, PA) over the past 37 years was such that all Atrium Facilities enjoy specialty and fellowship-trained anesthesiologists, including 74% of physicians at CHS-Main (in the subspecialties of cardiothoracic anesthesia, pediatric anesthesia, pediatric cardiothoracic anesthesia, pediatric critical care, pediatric pulmonology, obstetric anesthesia, neuro-anesthesia, transplant anesthesia, and regional anesthesia).

59. As referenced above, SAC developed for Atrium Facilities innovative protocols called Enhanced Recovery After Surgery ("ERAS"), which are multi-modal perioperative care pathways designed to achieve early recovery after surgical procedures by maintaining pre-operative organ function and reducing the profound stress response that often occurs following surgery. SAC's ERAS protocols offer to the community preoperative counseling, optimization of nutrition, standardized analgesic and anesthetic regimens, and early post-operative mobilization. Dr. Wherry spent substantial time—as part of his "evaluation" ruse —interviewing individuals associated with SAC in order to learn the proprietary details of SAC's use, methodologies and implementation of such protocols.

60. Defendant Dr. Wherry, through Scope Anesthesia, intends to roll back all of these care models, endangering patient lives, facts which were brought to Atrium's attention, but ignored. Defendants' scheme will dramatically increase the risk of patient harm and radically transform the care-delivery model for Atrium's patients in the region and the standard of care that has been the backbone of the existing program provided and managed by Plaintiffs:

a. Dr. Wherry, Atrium and Scope Anesthesia will reduce the number of attending anesthesiologists by 24.1 FTEs throughout the Atrium

Facilities—a reduction of available anesthesiologists at every clinical location serviced by SAC.

b. Dr. Wherry, Atrium and Scope Anesthesia will also implement a "CRNA only" anesthesia model at several Atrium locations, including CHS-King Mountain, North Carolina. Dr. Wherry believes that non-physician CRNAs should practice more during medical procedures at Atrium without licensed anesthesiologist participation and engage in procedures that currently are performed for patients by licensed physicians.

c. In those limited instances where there will be actual physician supervision, Dr. Wherry will require anesthesiologists to attempt to supervise a far higher ratio of CRNAs than was the case under SAC's medical direction service model.

d. Further, non-physician CRNAs will assume patient care and coverage for OB Labor and Epidural Activity without anesthesiologist intervention at several Atrium Facilities.

e. In addition, "in house" attending anesthesiologist 24/7 coverage will be eliminated at several Atrium hospitals.

f. At CHS-Pineville, specialty Cardiac Anesthesiology on-call coverage will be eliminated.

g. The current daytime allocations of anesthesiologists serving CMC-Mercy will be reduced from 5 physicians to 3.

h. Defendants' plan will reduce anesthesiologist Full Time Equivalents ("FTEs") at CMC-Main by 32% from the current levels of patient service provided by SAC.[2]

61. The above actions by Atrium will deprive area surgeons and patients of the experience, staff supervision and active presence of SAC anesthesiologists at the levels of care that SAC has for 37 years at all times been ready, willing and able to provide to the community. These actions will also increase risks of liability for surgeons, will result in delays in treatment or

[2] To illustrate the draconian nature of Defendants' intent, Scope Anesthesia's recruiting advertisements originally did not include any staffing for pediatric anesthesiologists, a critical specialty required to support the needs of Levine Children's Hospital. Dr. Wherry began to list such a position only after Plaintiffs brought this to light in correspondence to Atrium and the surgeons.

assessment of unseen or emergency events during procedures, and will disproportionately impact rural hospitals and facilities serving at-risk populations in the region.

62. The actions of Defendants will also harm the livelihoods and families of the more than 90 SAC Physicians who currently serve the public at the Atrium Facilities. Those physicians, including Plaintiff Dr. Sauder, recognize the validity and enforceability of their Restrictive Covenants, and thus the only way in which they can continue to serve patients in the area after June 30, 2018 given Defendants' actions, is to violate their non-compete obligations—obligations that, as noted above, Atrium has previously requested the court to enforce. Lilly Aff., ¶ 27.

63. Defendants are creating a situation where dedicated SAC anesthesiologists must either violate their contractual commitments or move themselves and their families (and their services to patients) out of the region—all while potentially causing a shortage of experienced physicians familiar with local surgeons' practices and patient needs.

64. Such a shortage, if it occurs, will have been specifically engineered and manufactured by Atrium purely in pursuit of its profit motive. It is a potential shortage that, along with harm to the SAC Physicians and their families, could be avoided if Atrium would simply continue the professional services agreement with SAC. This would have allowed the SAC Physicians to continue to provide services at Atrium like they have done for 37 years, allowed them and their respective families to remain in the Charlotte market, allowed the patients of Charlotte to receive safe and quality-driven surgical care, and eliminated the manufactured public health crisis that Atrium will certainly assert if not stopped by this Court.

65. After learning of the above, SAC exercised its right and privilege to inform affected surgeons and others of their desire to continue to provide proper levels of care and of the risks that they believed existed if changes such as those that Dr. Wherry proposed were enacted. Atrium

responded, in an email dated February 13, 2018, by demanding that the Provider and Management Plaintiffs "cease and desist" such communications, threatening "legal claims by Atrium against Mednax/SAC." Atrium then blocked the ability of certain individuals associated with their facilities to receive any emails from SAC. In other words, Atrium sought to stifle any public discourse of the potential risks to the medical and patient community of their planned actions.[3]

H. Defendant Atrium's Conduct Benefits Its Bottom Line, Not Its Patients.

66. Defendant Atrium's termination of SAC is consistent with its culture, specifically one that prizes hyper-growth and financial returns above all else, to the detriment of providing quality patient care.

67. While attempting to justify the decrease in the level of anesthesia services to be provided at its facilities as a cost cutting measure, Atrium at the same time has spent lavishly on executive compensation and on activities unrelated to the provision of quality healthcare. Atrium recently disclosed the 2017 compensation of its ten highest paid executives as follows:

- Gene Woods, CEO $5,380,055
- Greg Gombar, Chief Financial Officer, $2,486,819
- Roger Ray, Chief Physician Executive, $2,309,197
- Debra Plousha Moore, System Chief of Staff, $1,753,048
- Dennis Phillips, Executive Vice President of Metro Group, $1,736,787
- Craig Richardville, Chief Information and Analytics Officer, $1,644,642
- Terry Akin, CEO of Cone Health, $1,622,055
- Keith Smith, General Counsel, $1,545,870
- Carol Lovin, Chief Strategy Officer, $1,432,322
- James Hunter, Chief Medical Officer, $1,178,886

[3] Such a demand by Atrium is consistent with its recent efforts elsewhere in the market. *See, e.g., DiCesare v. The Charlotte-Mecklenburg Hospital Authority*, Case No. 2016-CVS-16404, Order on Motion for Judgment on Pleadings, Sept. 9, 2016, ¶ 42 (holding that class action plaintiffs in insurance steering case, among other things, sufficiently stated a claim against Atrium for having "denied access to truthful information that would enable Plaintiffs [patients] to comparison-shop based on cost and quality.").

Additionally, Plaintiffs are informed and believe, and therefore allege, that Atrium has in past years spent millions of dollars annually on marketing activities, including but not limited to, sums paid to be recognized as the "Official Healthcare Sponsor" of the Carolina Panthers, the Charlotte Hornets and Lowes Motor Speedway.

68. Atrium has rapidly sought to increase its market share across not only the Charlotte and western North Carolina regions, but to expand its foothold across the State and, as recently announced, into the state of Georgia. Atrium already owns, manages, or is otherwise affiliated with some 47 hospitals. On the heels of its name change announcement (Atrium now being known as Atrium Health), Atrium announced its intention to acquire yet another five hospitals in Georgia, currently operated by an entity known as Navicent Health. During this same period, Atrium announced layoffs of 90 of its own personnel as part of what it calls its "Destination 2020" strategy.[4]

FIRST CAUSE OF ACTION
(DECLARATORY JUDGMENT)
(All Defendants)

69. Plaintiffs reallege the above allegations and the same are incorporated by reference as if fully set forth herein.

70. There now exists between Plaintiffs and Defendants an actual, real and justiciable controversy concerning the propriety of Defendants' acts and omissions as detailed hereinabove, Atrium's ability to cut Plaintiffs out of the market for the provision and management of professional anesthesia services in the greater Charlotte and western North Carolina region, the

[4] In a further attempt to expand its economic power, Atrium announced in 2017 an intended combination with UNC Health Care to create a medical business behemoth with annual revenues of more than $13 billion. On or about March 2, 2018, Atrium announced it would not go through with the deal; a principal reason for Atrium's refusal was its inability to guarantee that it would have control over the finances and operations of the new entity.

ability of Atrium and Scope Anesthesia to utilize the professional anesthesiology services of any of the SAC Physicians in violation of the Restrictive Covenants, and litigation concerning the same is unavoidable and inevitable.

71. Consequently, pursuant to N.C.G.S. § 1-253 *et seq.*, N.C. R. Civ. P. 57, or other applicable law, Plaintiffs are entitled to a declaratory judgment that Defendants, and none of them, are to be permitted to provide professional anesthesia services at the Atrium Facilities to, through, or in connection with (whether by direct hire, contract, subcontract or utilization of management or consulting services or otherwise) any person or entity (including without limitation Dr. Wherry and/or Scope Anesthesia) who has at any time been privy or had access to the non-public confidential, proprietary and trade secret information of the Provider and Manager Plaintiffs, including the SAC Confidential Information as described hereinabove, and that Defendants, and none of them, are to be able to force Plaintiffs out of the Market described hereinbelow by cessation of the Atrium Agreement in restraint of trade, that Atrium must maintain the status quo of the privileges of the SAC Physicians, permitting them, through SAC, to continue to serve patients at the Atrium Facilities under terms and conditions as set forth in the current Atrium Agreement unless otherwise voluntarily changed by agreement of SAC and Atrium, that Atrium may not terminate privileges of the SAC Physicians for improper purposes (i.e., other than for good medical cause), and that Atrium may not utilize the professional anesthesiology services of any of the SAC Physicians in violation of their Restrictive Covenants.

72. In addition, the Confidentiality Requirements of the Atrium Agreement state that "Group [SAC] and the Authority [CHS] acknowledge and agree that the recovery of damages may not be an adequate means to redress a breach of" the Confidentiality Requirements, "and

accordingly, the parties specifically agree that each of them shall have the right of injunctive relief or specific performance as a result of a breach of" such Requirements.

73. Plaintiffs are therefore also entitled, pursuant to N.C. R. Civ. P. 65, to a temporary restraining order or preliminary and permanent injunction preventing the use or disclosure in any way, including in connection with the provision of professional anesthesia services at the Atrium Facilities to or through (whether by direct hire, contract, subcontract or utilization of management or consulting services or otherwise) any person or entity (including without limitation Dr. Wherry and/or Scope Anesthesia) who has at any time been privy or had access to the non-public confidential, proprietary and trade secret information of the Provider and Manager Plaintiffs as described hereinabove.

SECOND CAUSE OF ACTION
(BREACH OF CONTRACT)
(Defendant Atrium)

74. Plaintiffs reallege the allegations set forth in the above paragraphs and the same are incorporated by reference as if fully set forth herein.

75. Atrium entered into the Atrium Agreement with SAC.

76. The Atrium Agreement is a valid contract enforceable by SAC.

77. SAC has performed all of the material conditions, covenants and promises required to be performed in accordance with the terms and conditions of the Atrium Agreement. All conditions precedent to the bringing of this claim have been satisfied, have occurred or have been waived.

78. Atrium has flagrantly breached the Atrium Agreement by, among other things, violating the Confidentiality Requirements. The Atrium Agreement's Confidentiality Requirements allow Atrium to disclose SAC's confidential information only for the purposes of

enabling the disclosing party to perform its obligations to the other party or to pursue and evaluate the business relationship with the other party. Atrium provided Dr. Wherry access to vast amounts of the Provider and Manager Plaintiffs' non-public confidential, proprietary and trade-secret information. Dr. Wherry in effect became privy to the confidential inner-workings of the Provider and Manager Plaintiffs' business model, learning everything necessary to provide professional anesthesia services. Although Atrium purportedly used Dr. Wherry as a management consultant, it is now clear from Atrium's termination of the Atrium agreement and subsequent hiring of Dr. Wherry's Scope Anesthesia that Atrium was providing him with Provider and Manager Plaintiffs' information so that he could use it to cut Plaintiffs out of the marketplace. Such a wrongful purpose is in direct violation with the explicit requirements of the Confidentiality Requirements.

79. Furthermore, the Atrium Agreement requires individuals to whom confidential information is disclosed to agree to be bound by the Confidentiality Requirements. Atrium breached this requirement by providing Dr. Wherry with confidential information without requiring Dr. Wherry sign onto or otherwise adhere to the Confidentiality Requirements of the Atrium Agreement.

80. Atrium's breaches of the Atrium agreement were willful and material.

81. Atrium's material breaches of the Atrium agreement have denied SAC the benefit of its bargain.

82. In addition to other rights, the Atrium Agreement provides, "To the fullest extent permitted by law, the Authority [CHS] shall indemnify Group [SAC] against any and all losses, damages, liabilities, costs and expenses of any kind or nature whatsoever, including reasonable attorneys' fees, costs and expenses, incurred by Group as a result of the breach by the Authority or any employee, agent or independent of the Authority under the terms of this Agreement."

83. As a proximate cause of such breaches, SAC has been damaged and is entitled to recover in this action from Atrium a sum in excess of $25,000, together with pre- and post-judgment interest, reasonable attorneys' fees and costs as provided by law and by the Atrium Agreement.

THIRD CAUSE OF ACTION
(BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING)
(Defendant Atrium)

84. Plaintiffs realleges the allegations set forth in the above paragraphs and the same are incorporated by reference as if fully set forth herein.

85. Under the covenant of good faith and fair dealing implied in every contract in North Carolina, all parties to a contract must act upon the principles of good faith and fair dealing to accomplish the purpose of an agreement, and therefore each has a duty to adhere to the presuppositions of the contract for meeting this purpose and a duty not to do anything that will deprive the other of the fruits of his bargain. Furthermore, where a contract confers on one party a discretionary power affecting the rights of the other, this discretion must be exercised in a reasonable manner based upon good faith and fair play.

86. Atrium acted in bad faith, and with the specific intent to defeat the purpose of the agreement between SAC and Atrium, by (a) negotiating an extension of the Atrium Agreement with SAC insisting on a "no shop" provision that began on January 1, 2018, while having already secretly committed to replacing SAC supposedly two business days before the no-shop period took effect, and (b) participating in a scheme and conspiracy with Dr. Wherry (and later with Scope Anesthesia) to give Dr. Wherry access to all the non-public, confidential information of SAC necessary for him to "jump start" and obtain an unfair advantage in becoming a competitor in the

provision of professional anesthesia and related staffing, scheduling, practice management services and the pricing of such services (the "Relevant Services") in the Market.

87. This conduct was undertaken to monopolize and drive the Plaintiffs out of business in the Market.

88. Atrium has wrongfully attempted to destroy the existence of the Plaintiffs in the regional marketplace via its scheme with Dr. Wherry and Scope Anesthesiology and thereby eliminate any ability for such Plaintiffs to compete in such marketplace—all in order to render the Restrictive Covenants with the SAC Physicians purportedly moot, opening the way for Defendants to hire them with impunity. Such actions are a further breach of the implied covenant of good faith and fair dealing.

89. As a proximate result of Atrium's breach of the implied covenant of good faith and fair dealing, SAC has been injured and damaged in a sum in excess of $25,000 in actual, incidental and consequential damages, which SAC is entitled to recover of the Individual Defendants, with pre- and post-judgment interest, reasonable attorneys' fees and costs as provided by law and by the Atrium Agreement.

90. Atrium also cannot, consistent with the Atrium Agreement, destroy the existence of the Plaintiffs in the regional marketplace via its scheme with Dr. Wherry and Scope Anesthesiology and thus, having eliminated any ability for such Plaintiffs to compete in such marketplace, render the Restrictive Covenants with the SAC Physicians purportedly moot by manufacturing a health crisis when Dr. Wherry and Scope Anesthesia are not able to staff their agreement for anesthesia services—all as part of their plan to open the way for Defendants to hire the SAC Physicians with impunity. Such actions are and will be a further breach of contract and

implied covenant of good faith and fair dealing on the part of Atrium and will in fact result in substantial harm and damages to the Plaintiffs before the time of the trial in this action.

FOURTH CAUSE OF ACTION
(MISAPPROPRIATION OF TRADE SECRETS)
(All Defendants)

91. Plaintiffs realleges the allegations set forth in the above paragraphs and the same are incorporated by reference as if fully set forth herein.

92. As described above, Defendants, as they perpetrated their scheme and conspiracy, obtained detailed knowledge of the SAC Confidential Information.

93. The SAC Confidential Information constitutes trade secrets in that it derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or lawful reverse engineering by persons who can obtain economic value from their disclosure or use.

94. At all times relevant hereto, the Provider and Manager Plaintiffs made reasonable efforts under the circumstances to maintain the secrecy of its trade secrets, including but not limited to having Atrium enter into contractual agreements, and having the terms of its employment agreements with anesthesiologists subject to confidentiality provisions.

95. By their conduct described above and as will be proven via discovery in this action, Defendants have wrongfully misappropriated the trade secrets of the Provider and Manager Plaintiffs.

96. Under the North Carolina Trade Secrets Protection Act, N.C.G.S. § 66-152 et seq., the Provider and Manager Plaintiffs have and are entitled to a civil remedy at both law and equity against Defendants, and each of them, for their misappropriation of trade secrets.

97. In accordance with N.C.G.S. § 66-155(1), Defendants, and each of them, knew that the SAC Confidential Information constituted trade secrets as defined in N.C.G.S. § 66 152(3).

98. Pursuant to N.C.G.S. § 66-154(a), the Court may enjoin Defendants, and those in concert with Defendants, from using and disclosing such trade secrets and order Defendants to return all SAC Confidential Information.

99. Pursuant to N.C.G.S. § 66-154(b), the Provider and Manager Plaintiffs have been damaged by such misappropriation of trade secrets and are entitled to recover damages in a sum in excess of $25,000 in actual, incidental and consequential damages (including but not limited to part and/or future lost revenues, lost profits, and lost business opportunities), together with pre- and post-judgment interest, reasonable attorneys' fees and costs as provided by law, as measured by their economic loss and lost profits or by Defendants' unjust enrichment and profits gained, whichever is greater.

100. Defendants' misappropriation was willful and malicious; Defendants have no legal claim to such trade secrets and had no legal justification for obtaining or using those secrets.

101. Consequently, pursuant to N.C.G.S. § 66-154(c) and (d), the Provider and Manager Plaintiffs are entitled to punitive damages and attorneys' fees due to Defendants' willful and malicious misappropriation.

FIFTH CAUSE OF ACTION
(TORTIOUS INTERFERNCE WITH CONTRACT)
(Defendants Dr. Wherry, Total Anesthesia, and Scope Anesthesia)

102. Plaintiffs reallege the allegations set forth in the above paragraphs and the same are incorporated by reference as if fully set forth herein.

103. At all relevant times, SAC and Atrium were parties to the Atrium Agreement, which is a legally binding and valid contract. In addition, the Plaintiffs were parties to legally binding

and valid contracts by and among themselves, including the physician employment agreements of the SAC Physicians including that of Dr. Sauder.

104. Dr. Wherry, and through him Total Anesthesia and Scope Anesthesia, was aware, and had knowledge of the terms and conditions of the agreements described in the preceding paragraph (the "Known Agreements").

105. Dr. Wherry, and through him Total Anesthesia and Scope Anesthesia, interfered with the Known Agreements. Dr. Wherry and Total Anesthesia, under false pretenses, obtained Provider and Manager Plaintiffs' confidential information. Dr. Wherry and Total Anesthesia wrongfully used this information to establish Scope Anesthesia, a rival anesthesia service provider. Dr. Wherry and Total Anesthesia's purpose in creating Scope Anesthesia was to cause Atrium to terminate the Atrium Agreement, replacing Plaintiffs with Dr. Wherry and Scope Anesthesia. Upon information and belief, Dr. Wherry, acting for the benefit and as agent of the other defendants, has solicited the SAC Physicians by, among other things, encouraging them to contact him for employment through their attorneys. Such interference with the above agreements was wrongful, malicious, tortious, improper in motive and means, and conducted without any legitimate business purpose.

106. As a proximate result of such tortious interference, Plaintiffs have been injured and damaged in a sum in excess of $25,000 in actual, incidental and consequential damages (including but not limited to part and/or future lost revenues, lost profits, and lost business opportunities), which the Plaintiffs are entitled to recover of the Defendants Dr. Wherry, Total Anesthesia, and Scope Anesthesia, with pre- and post-judgment interest, reasonable attorneys' fees and costs as provided by law.

SIXTH CAUSE OF ACTION
(FRAUD AND/OR NEGLIGENT MISREPRESENTATION)
(All Defendants)

107. Plaintiffs reallege the allegations set forth in the above paragraphs and the same are incorporated by reference as if fully set forth herein.

108. Defendants, conspiring together and acting as agents of one another, intentionally (or alternatively negligently) made misrepresentations of material fact alleged above, including misrepresentations about the purpose for which Dr. Wherry was acquiring the non-public confidential, proprietary, and trade secret information of the Provider and Manager Plaintiffs, and also the representations on November 19, December 13, 19, and 22 described above as to Atrium's intention to continue to consider proposals made by the Provider and Manager Plaintiffs.

109. Such representations of material facts and omissions of material facts by Defendants are described above in paragraphs 30 (paragraphs 11 and 14 of Lilly Aff. regarding Atrium's belief that it was in its best interest to utilize SAC's services), 35 (secretly making use of SAC information), 36-39 (false representation as to Dr. Wherry's role and purpose), 42 (willingness to negotiate renewal), 43, 45, and 55 (intent to extend contract and abide by no-shop provision), 50-52 (detailing numerous misrepresentations), 46-48, 53 (representation of non-solicitation and willingness to continue discussions), 54-55 (January 15, 2018 negotiation meeting despite already having committed to Dr. Wherry). Those representations were false when made.

110. Defendants, conspiring together and acting as agents of one another, made the material statements of fact described immediately above in order to induce the Provider and Manager Plaintiffs not to take action to protect their contractual rights and to forego any attempts to stop Dr. Wherry from making use of their non-public confidential, proprietary and trade secret information.

111. Defendants intended for the Provider and Manager Plaintiffs to rely on such representations, and Provider and Manager Plaintiffs in fact reasonably relied on such representations.

112. Provider and Manager Plaintiffs have been and will continue to be proximately harmed by the willful, wanton, malicious, and egregious misrepresentations, acts and omissions as described in the foregoing paragraphs. Consequently, Provider and Manager Plaintiffs are entitled to recover from Defendants, jointly and severally, compensatory damages in an amount in excess of $25,000 together with lost profits, punitive damages, and pre- and post-judgment interest and costs as provided by law.

SEVENTH CAUSE OF ACTION
(CIVIL CONSPIRACY)
(All Defendants)

113. Plaintiffs reallege the allegations set forth in the above paragraphs and the same are incorporated by reference as if fully set forth herein.

114. Defendants, acting in concert or combination and/or through other legal entities, and through their improper and unlawful means, had and have, as described hereinabove, an agreement or understanding to accomplish the unlawful acts described hereinabove in order to wrongfully restrain trade and unfairly compete.

115. Specifically, Defendants, and each of them, conspired with one another, to wrongfully utilize the non-public confidential, proprietary and trade secret information of the Provider and Manager Plaintiffs, to interfere with the existing contractual relationships between SAC and MEDNAX, between AASE and SAC, between the Provider and Manager Plaintiffs and their employees including Dr. Sauder, to deprive more than 90 physicians in the region of their livelihoods and the public of the benefit of their years of experience in providing professional

anesthesiology services, and to exclude Plaintiffs from the marketplace and cause irreparable harm to Plaintiffs as a result.

116. Plaintiffs have been and will continue to be proximately harmed by the willful, wanton, malicious and egregiously wrongful acts engaged in and employed by Defendants and their agents to achieve their unlawful objectives and/or by their unlawful acts in furtherance of their conspiracy. Consequently, Plaintiffs are entitled to recover from Defendants, jointly and severally, compensatory damages in an amount in excess of $25,000 together with lost profits, punitive damages and pre- and post-judgment interest and costs as provided by law.

EIGHTH CAUSE OF ACTION
(MONOPOLIZATION/ATTEMPTED MONOPOLIZATION)
(Defendant Atrium)

117. Plaintiffs reallege the above allegations and the same are incorporated by reference as if fully set forth herein.

118. As described above, the "Relevant Services" offered by Plaintiffs and on which Atrium has focused its anticompetitive efforts are the provision of professional anesthesia and related staffing, scheduling and practice management services, and the pricing of such services.

119. As of the date of the filing of this Complaint, another competitor provides the Relevant Services for certain of Atrium's facilities. That entity, Northeast Anesthesia and Pain Specialists, P.A. ("Northeast Anesthesia") provides the Relevant Services at, among other locations, the CMC-Northeast facility. However, similar to the manner in which Atrium is attempting to negatively alter the patient care model at the other facilities described above, Atrium has informed Northeast Anesthesia that it desires to lease physicians for professional anesthesia services at CMC-Northeast and, upon information, impose the harmful measures described hereinabove on such facility and its patients.

120. Once it fully enacts its anticompetitive scheme, Atrium (acting through itself and the instrumentality of Scope Anesthesia whose services it will control for billing, pricing and other purposes) will control at least 50% percent of the market for the Relevant Services in Mecklenburg, Cabarrus, Cleveland, Lincoln, and Union Counties (hereinafter the "Market" or "Dominated Market"). In fact, in Cabarrus, Cleveland, Lincoln, and Union, Atrium will control nearly 100% of the market share for the Relevant Services.

121. Historically, payors such as United Healthcare and Blue Cross Blue Shield have held bargaining power sufficient to negotiate with multiple providers of the Relevant Services in the region as to reimbursement rates and pricing for such Relevant Services. Under the leasing model demanded by Atrium, the "lessee" of the physician services is the entity that prices and bills for the services in question. Defendants' scheme as detailed herein will therefore result in those payors having only one such provider and billing entity—CHS—with which to negotiate such rates and pricing. Atrium's monopolistic market power for the Relevant Services in the Dominated Market will therefore eliminate competition and harm the consuming public.

122. By ejecting from the Market any provider of the Relevant Services who did not agree to a leasing model with sub-par FTE physician staffing and CRNA ratios, Atrium will thus usurp for itself all revenue in excess of professional compensation and minimal overhead for such Relevant Services.

123. Atrium's participation in the scheme and conspiracy detailed herein is part of an overall attempt by Atrium to engage in unfair competition and restraint of trade.

124. Significant and substantial barriers to entry or expansion exist in such Market such as capital costs, training, licensing, credentialing and education of providers, as well as regulatory restrictions at the state and federal level. Among the significant regulatory restrictions is the North

Carolina Certificate of Need law, Chapter 131E, Article 9 of the North Carolina General Statutes. This law, which has been recognized as one of the most of the restrictive in the nation, requires a lengthy application and hearing process for proposals to develop or offer many types of healthcare services. *See* N.C. Gen. Stat. § 131E-175, *et. seq.*

125. Atrium is the dominant market power in the relevant Market and has long enjoyed such dominance and the bargaining power that goes along with the same. As recently as 2014, Atrium had approximately $8.7 billion in enterprise-wide annual revenue. From 2011 to 2015, Atrium increased its number of care locations by over fifty percent, from around 600 to over 900, largely through acquisitions.

126. Atrium's market power has put it in a position to demand favorable provisions from insurers at a steep cost to competitors and consumers. The United States Department of Justice Antitrust Division is currently suing Atrium, in an action in the United States District Court for the Western District of North Carolina, Case No. 3:16cv00311 (the "Department of Justice Suit"), because Atrium has unlawfully exercised its market dominance to force commercial insurance companies to agree not to "steer" patients to lower cost and higher quality providers.

127. Atrium has also been sued in the Superior Court of Mecklenburg County in a proposed class action matter entitled *DiCesare v. The Charlotte-Mecklenburg Hospital Authority*, Case No. 16-CVS-16404 (the "Mecklenburg Class Action"). The pleadings in such action assert that Atrium's contractual activities with insurance companies reduce competition in the Charlotte area and increase the price of healthcare service. The North Carolina Business Court recently issued an order refusing to dismiss the claims because of allegations as to Atrium's market power based on the facts set forth in the class action complaint. More recently, Atrium was sued in the United States District Court for the Western District of North Carolina in another proposed class

action entitled *Benetez v. The Charlotte-Mecklenburg Hospital Authority et al.,* Case No. 3:18-vs-00095-RJC-DCK (the "W.D.N.C. Class Action). The pleadings in such action assert that Atrium violated the Sherman Antitrust Act by restricting insurance companies from referring, or "steering," and offering patients information and financial benefits to use less-expensive healthcare services by Atrium's competitors.

128. Atrium in fact has or does impose such contractual restrictions on insurance companies as asserted in the Mecklenburg Class Action and in the W.D.N.C. Class Action.

129. The calculated and intentional actions of Atrium described herein demonstrate they have further engaged in predatory and anti-competitive conduct with a specific intent to monopolize the Dominated Market, and they have a dangerous probability of achieving monopoly power.

130. Atrium's actions and attempted actions against Plaintiffs and against Northeast Anesthesia as described herein are injurious to competition and consumer welfare in the Dominated Market area, and raise or will raise prices for insurers, patients and providers and will negatively impact patient care and access to appropriate and quality-driven care.

131. Atrium's exclusionary conduct is demonstrative of the market dominance it enjoys and intends to increase. Atrium's refusal to negotiate with the Provider and Manager Plaintiffs demonstrate its willful attempts to further increase and maintain its market power and dominance.

132. The actions of Atrium described herein therefore constitute illegal monopolization and/or attempted monopolization of the relevant market in violation of N.C.G.S. § 75-2.1.

133. As a result, Plaintiffs have been damaged in an amount in excess of $25,000 and are entitled to recover same from Atrium. Pursuant to N.C.G.S. §§ 75-16 and 75-16.1 and other

applicable law, Plaintiffs are entitled to have such damages trebled and to an award of costs and reasonable attorney's fees.

NINTH CAUSE OF ACTION
(RESTRAINT OF TRADE)
(All Defendants)

134. Plaintiffs reallege the above allegations and the same are incorporated by reference as if fully set forth herein.

135. Atrium engaged and conspired with Dr. Wherry and Total Anesthesia with the intent and purpose of eliminating Plaintiffs from the Relevant Market (through establishment of Scope Anesthesia and otherwise) in order to further increase its dominant power in the Market.

136. Defendants' collusive conduct described hereinabove to misappropriate the SAC Confidential Information, all while planning and scheming to utilize such Information in order to form a new entity to compete against Plaintiffs by taking over the provision of the Relevant Services, is a conspiracy or combination that unlawfully restrains trade.

137. The conduct of Defendants (including the resulting contractual relationship between them) to exclude Plaintiffs and others from the Relevant Market in order to achieve total Market dominance for the Relevant Services is unreasonable and unlawfully restrains trade.

138. As part of such scheme to unlawfully restrain trade, Defendants have also wrongfully and tortiously interfered with the existing contractual relationships between SAC and MEDNAX, between AASE and SAC, and between the Provider and Manager Plaintiffs and their employees including Dr. Sauder, to further their conspiracy and to destroy the Provider and Manager Plaintiffs' labor force in the Dominated Market as will be shown through discovery in this action. Upon information and belief, Defendants have undertaken such action by, among other things, making false and defamatory statements concerning the Provider and Manager Plaintiffs to

Atrium medical staff, to SAC Physicians, to CRNAs in the Market, and by means of false interviews with such persons by Defendants and/or third parties acting on their behalf.

139. Consequently, Defendants' actions constitute an act, contract, combination or conspiracy and unreasonable restraint of trade within the meaning of N.C.G.S. §§ 75-1 and 75-2.

140. As a result, Plaintiffs have been damaged in an amount in excess of $25,000 and are entitled to recover same from Defendants. Pursuant to N.C.G.S. §§ 75-16 and 75-16.1 and other applicable law, Plaintiffs are entitled to have such damages trebled and to an award of costs and reasonable attorney's fees.

TENTH CAUSE OF ACTION
(COMMON LAW UNFAIR COMPETITION)
(All Defendants)

141. Plaintiffs reallege the allegations set forth in the above paragraphs and the same are incorporated by reference as if fully set forth herein.

142. Acting jointly as members of their conspiracy, Defendants engaged in coercive, unfair and unscrupulous commercial tactics—as detailed hereinabove—calculated to prevent others, including Plaintiffs, from providing the Relevant Services in the Dominated Market and from providing competitive pricing for such Services, all to the disadvantage of patients, payors, as well as to Plaintiffs.

143. The coercive and misleading tactics by Defendants and by each of them, constitute unfair competition, and Defendants' actions proximately injured and damaged Plaintiffs since Plaintiffs (and all SAC physicians) have, if Defendants' actions are not reversed, been forced out of the Market. Such conduct entitles Plaintiffs to a judgment of compensatory damages in an amount in excess of $25,000 together with consequential and incidental damages for lost business and profits, pre- and post-judgment interest and costs as provided by law, as well as punitive

damages for Defendants' willful, wanton, and malicious conduct, which was undertaken in order to punish and inflict monetary harm on Plaintiffs.

WHEREFORE, Plaintiffs respectfully pray this Court as follows:

1. That the Court enter a declaratory judgment that Defendants, and none of them, shall to be permitted to provide professional anesthesia services at the Atrium Facilities to, through, or in connection with (whether by direct hire, contract, subcontract, or utilization of management or consulting services or otherwise) any person or entity (including without limitation Defendants Dr. Wherry, Total Anesthesia and/or Scope Anesthesia) who has at any time been privy or had access to the SAC Confidential Information as described hereinabove, and that Defendants, and none of them, are to be able to force Plaintiffs out of the Market by cessation of the Atrium Agreement in restraint of trade, terminate privileges of the SAC Physicians for improper purposes, including seeking an order requiring that Atrium must maintain the status quo of the privileges of the SAC Physicians, permitting them, through SAC, to continue to serve patients at the Atrium Facilities under terms and conditions as set forth in the current Atrium Agreement unless otherwise voluntarily changed by agreement of SAC and Atrium, that Atrium may not terminate privileges of the SAC Physicians for improper purposes (i.e., other than for good medical cause), and that Atrium may not utilize the professional anesthesiology services of any or all of the SAC Physicians in violation of their Restrictive Covenants.

2. As to all claims described above, that the Court award judgment in favor of the Plaintiffs and against Defendants, jointly and severally, in an amount in excess of $25,000, together with pre- and post-judgment interest;

3. As to any of the willful, wanton, malicious and egregiously wrongful acts engaged in and employed by Defendants described herein, that the Court enter an award of punitive damages, jointly and severally, against Defendants;

4. That the costs of this action, including reasonable attorneys' fees, be taxed against Defendants to the extent permitted by applicable law and by the Atrium Agreement;

5. For a trial by jury on all issues so triable; and

6. For such other and further relief that the Court deems just and equitable.

RESERVATION OF RIGHTS
(For Injunctive Relief)

Plaintiffs hereby reserve all rights to seek appropriate injunctive relief as needed pursuant to Rule 65 of the North Carolina Rules of Civil Procedure and N.C.G.S. § 1-485, Chapter 66, and other applicable law, to prevent irreparable harm to Plaintiffs and to the public, pending resolution of this matter, including seeking an order requiring that Atrium must maintain the status quo of the privileges of the SAC Physicians, permitting them, through SAC, to continue to serve patients at the Atrium Facilities under terms and conditions as set forth in the current Atrium Agreement unless otherwise voluntarily changed by agreement of SAC and Atrium, that Atrium may not terminate privileges of the SAC Physicians for improper purposes (i.e., other than for good medical cause).

This the 26th day of March, 2018.

NELSON MULLINS RILEY & SCARBOROUGH LLP

Mark A. Stafford, N.C. Bar No. 16835
Candace S. Friel, N.C. Bar No. 36763
380 Knollwood Street, Suite 530
Winston-Salem, NC 27103
Telephone: 336.774.3333/Fax: 336.774.3374
336.774.3331/Fax: 336.774.3379
E-mail: mark.stafford@nelsonmullins.com
candace.friel@nelsonmullins.com

Noah H. Huffstetler, III, N.C. State Bar No. 7170
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612
Telephone: 919.329.3801/Fax: 919.329.3821
E-mail: noah.huffstetler@nelsonmullins.com

Attorneys for Plaintiffs

~#4826-5175-3567 v.6 - 3/24/2018 02:54 PM~